**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities | ) | GN Docket No. 00-185 |
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| Internet Over Cable Declaratory Ruling | ) | |
| | ) | |
| Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities | ) | CS Docket No. 02-52 |
| | ) | |

**COMMENTS OF THE CITY OF NEW YORK**

## INTRODUCTION

The City of New York ("City"), hereby submits the following comments in response to the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("Commission") in the above captioned proceeding. The City's comments specifically focus on the Commission's desire to "clarify the authority of State and local governments with respect to cable modem service."[1] The City's comments assume, without necessarily agreeing, that the Commission's recent Declaratory Ruling[2]

[1] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities and Internet Over Cable Declaratory Ruling and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Notice of Proposed Rulemaking (rel. Mar. 14, 2002) (*Internet Over Cable Facilities NPRM*), ¶ 96.

[2] *Id.,* ¶¶ 31-70

classifying cable modem service as an "information service" reflects current law.[3] At the same time, the City expressly reserves the right to revisit that assumption, and the arguments and conclusions arising from it, if the Commission's classification of cable modem service is ultimately modified by regulatory, legislative or judicial action.

To summarize, the City maintains that local franchising authority fundamentally arises from state and local law. Congress, the Commission and the courts have historically recognized and sought to preserve this "sovereign" authority. The City is deeply concerned about the NPRM's apparent, albeit ambiguous, suggestion that the Declaratory Ruling's reclassification of cable modem service as an interstate information service may now preclude, among other things, collection of franchise rents – where required by state and local law – associated with the use of public rights-of-way to provide this newly redefined service. Similarly, the NPRM appears to suggest, without sufficient grounds in law or policy, that the Commission may have statutory power to preempt local franchising authority generally with respect to cable modem service. As discussed below, certain approaches that appear to be suggested by the NPRM would inevitably lead to prolonged litigation and uncertainty over the regulation of cable modem service. This, in turn, could undermine the rapid rollout of such service currently underway.

The City urges the Commission to take several steps to avert this consequence. First, the Commission should make clear that it will not seek to preempt state and local franchising

[3] In this context, the City takes note that litigation over the validity of the Declaratory Ruling is pending before the 9th Circuit.

authority. Second, it should find that the Declaratory Ruling does not impair existing, contractually-based franchise agreements which, for franchise purposes only, treat cable modem service as a cable service. Third, on a prospective basis, the Commission should permit franchising authorities and providers of cable modem service to negotiate new agreements as between themselves. Fourth, the Commission should make utterly clear that the Communications Act does not preclude franchising authorities acting consistent with state and local law from collecting franchise rent on cable modem service revenues even if 5 percent is being charged against the gross revenues associated with cable service. Finally, the Commission should confirm that the Declaratory Ruling does not impair the power of franchising authorities to enforce customer service requirements on cable modem service.

## I. STATE AND LOCAL LAW PROVIDES INDEPENDENT FRANCHISING AUTHORITY FOR MUNICIPALITIES TO REQUIRE AN INFORMATION SERVICE FRANCHISE OF CABLE MODEM SERVICE PROVIDERS.

### Federal law is not the sole, or even the primary, origin of local franchising authority.

It is well established that the authority of local governments to require that the occupants of public right-of-way be authorized by franchise derives not from federal law, but from

state and local law.[4] This sovereign local authority has consistently been recognized and preserved, amid evolving communication technologies and competition, by Congress, the Commission and the courts. Indeed, local franchising authority has been repeatedly recognized and preserved in recent, major communications enactments, including the 1996 Telecommunications Act, the 1984 Cable Act and the Internet Tax Freedom Act.

Thus, the Telecommunications Act of 1996 expressly safeguards "the authority of a State or local government to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers."[5] The Commission, in interpreting this provision in In re TCI Cablevision of Oakland County, Inc.[6], in fact emphasized the traditional and important role of state and local governments in managing communications providers' use of public rights-of-way.

Similarly, in City of Dallas v. FCC[7] ("City of Dallas"), the Fifth Circuit Court of Appeals found the Section 621 cable franchise requirement contained in Title VI of the 1984 Cable Act "merely" to be a codification of, and limited restriction on, *"local governments' independently-existing authority to impose franchise requirements."*[8] The Fifth Circuit found support for this conclusion in both "persuasive dicta"[9] and in the

[4] *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893).

[5] *See* Communications Act, § 253(c), 47 U.S.C. § 253(c) (1996).

[6] 12 F.C.C.R. 21,296 (1997)

[7] 165 F.3d 341 (5th Cir. 1999).

[8] *Id.* at 348. (emphasis added, rejecting "the Commission's unsupported assertion that local franchising authority arises from § 621.").

[9] *See Id*.

legislative history of the Cable Act. With respect to legislative history, the Fifth Circuit cites the House report as follows:

> H.R. 4103 [which was incorporated into S. 66 to become the Cable Act] establishes a national policy that clarifies the current system of local, state, and Federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process.[10]

Finally, as discussed in greater detail below, the 1998 Internet Tax Freedom Act ("ITFA") purposely avoids imposing any limitation on local franchise fees. While Section 1101(a), precludes state and localities from imposing "any taxes" on Internet access,[11] Section 1104(8) unambiguously excludes franchise fees from the term "taxes."[12] Section 1104(8)(B) makes the matter utterly clear by providing that the term "taxes," as set forth in the ITFA, "does not include any franchise fee or similar fee imposed pursuant to section 622 or 653 of the Communications Act of 1934 . . . or any other fee related to obligations of telecommunications carriers under the Communications Act of 1934."

**Existing local franchising authority is no respect mitigated by the Commission's recent classification of cable modem service as an interstate information service.**

[10] *Id*.

[11] Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Title XI, §§ 1100-1104, 112 Stat. 2681-719 (1998), 47 U.S.C. § 151 (*"Internet Tax Freedom Act" or "ITFA"*).

The result of the Commission's Declaratory Ruling should not be understood to preclude those jurisdictions, with franchising authority that arises out of state or local law, from requiring a franchise for the provision of cable modem service now that it has been classified as an information service.[13] Unfortunately, certain ambiguities in the language of the NPRM have led to concerns that the Commission intends to reach conclusions which rely on such an understanding, including, for example, conclusions with respect to franchise rentals (discussed in this section) and franchising generally (discussed further below).

As the NPRM observes, "franchising authorities have expressed concern that their right to collect franchise fees on cable modem service for the use of public rights-of-way would be affected if we were to find that cable modem service is not cable service."[14] Indeed, the concern of franchising authorities, including the City, has been heightened by the NPRM's ambiguous language on this matter. The Commission should allay this concern by clarifying the language in Paragraphs 105 through 107 of the NPRM, and revising the tentative conclusions stated therein, to make clear that the Declaratory Ruling is not intended to preclude localities with legitimate franchising authority from collecting franchise rent that reflects the provision of cable modem service by cable companies.

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[12] *Id*., § 1104(8)

[13] Indeed, any conclusion or action reflecting such an understanding would be beyond the Commission's authority.

Paragraph 105 of the NPRM quotes the language of the first sentence of Section 622(b) as follows: "We note that Section 622(b) provides that 'the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operators gross revenues derived . . . from the operation of the cable system to provide cable services.'"[15] Even assuming for the moment that the facilities used to offer cable modem services constitute a "cable system,"[16] the quoted language of Section 622(b) is fundamentally ambiguous with respect to the treatment of revenues generated from services other than cable services. There are two significantly different, and mutually exclusive, interpretations one can bring to the "to provide cable services" clause added by Congress in 1996.

- The Rational Interpretation. Under this interpretation, the clause means that the 622(b) franchise rent cap is not to be applied to revenue from services other than cable services. (This is a sensible, platform-neutral interpretation, inasmuch as revenue from similar services provided by entities other than cable companies is not subject to the 622(b) cap, because they are not subject to Title VI.)

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[14] *Internet Over Cable Facilities NPRM,* ¶ 105.

[15] *Id.*

[16] As discussed infra, the Commission itself, in Paragraphs 12-13 of the NPRM, finds that facilities that existed as "cable systems" (as that term is defined in the Communications Act) must be substantially re-designed to provide two-way information services. Such redesign appears – now that the Commission has determined that cable modem service is not a "cable service" – to render at least those elements of such facilities that are used to provide information service to be no longer part of a "cable system" (because not "designed to provide cable service"). However, for purposes of this section of the City's comments, it will be assumed, *arguendo*, that all of the franchisee's facilities were part of a "cable system." Such assumption in this part of these comments is not to be construed as any concession that facilities designed to provide cable modem service are to be treated as a "cable system." Indeed, they cannot and should not be so treated.

- The Arbitrary Interpretation. Under this interpretation, the clause means that in calculating 5 percent of gross revenues from facilities that are providing both cable services and other services franchise rent one would simply stop counting at 5 percent of cable service revenue. (Oddly, under this interpretation, revenue from other services would simply "dribble off," unaccounted for, solely and merely because it is provided by a company that also provides cable service.)

To use an arithmetical example, suppose a company's facilities generate $2 million in cable service revenue and $1 million in information service revenue. Under the Rational Interpretation, the franchise rent would be capped at $100,000 (i.e., 5 percent of the $2 million in cable services revenue) plus whatever, if anything, state and local law permits the franchising authority to charge in rent with respect to the information services revenue. Under the Arbitrary Interpretation, in contrast, the franchise rental would be capped at $100,000, with nothing permitted to be charged with respect to cable modem revenue even if state and local law permitted some charge.

Under the Arbitrary Interpretation, cable modem revenue would sometimes still be subject to some franchise fees, but only in those jurisdictions that had chosen to keep franchise rent on cable service below 5% (because the cumulative rent – rent derived from cable service revenue rent plus rent derived from cable modem service revenue – would be within the 5% cap applied to cable service revenue alone). There is no need to bother trying to figure out how that arbitrarily partial and occasional result makes any policy sense because, in fact, both legislative intent and Commission policy make clear

that the Rational Interpretation is the only appropriate and defensible interpretation of the statutory clause in question.[17]

The legislative history of the 1996 Telecommunications Act eliminates any uncertainty about what Congress intended when it added the clause "to provide cable services" to Section 622(b). The 1996 Telecommunications Act conference committee report[18] states, unambiguously, with respect to the "to provide cable services" clause:

> Subsection (b) amends section 622(b) of the Communications Act by inserting the phrase "to provide cable services." This amendment makes clear that the franchise fee *provision* is not intended to reach revenues that the cable operator derives for providing new telecommunications services over its system, but only the operator's cable-related revenues."[19]

Note that the intention expressed by the conference committee report is that the *provision* is not to reach revenues from other than cable-related revenues. That is, the *provision,* which is a cap on franchise rental, is not to cover non-cable service revenue.[20] The

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[17] There is another potential treatment of cable modem revenue, under which no rental would be collected even if the existing rental on cable service were less than 5%. But this treatment could only be potentially plausible if the limitation "to provide cable services" were incorporated somewhere in Section 622(a) (on the theory that then 622(a)'s establishment of Title VI franchise rental would be limited to only rental on cable services). Because "to provide cable services" was not added to the establishing clause 622(a), but rather to the cap clause 622(b), the issue is limited to whether the Rational Interpretation or the Arbitrary Interpretation is the appropriate one.

[18] Joint Explanatory Statement of the Committee of the Conference, in House Conference Report No. 104-58, at p. 180, reprinted at 1996 U.S.C.C.A.N. at 193.

[19] *Id.*

[20] It is true that the conference committee report makes a reference to "telecommunications services" as the services that will not be subject to the 5% cap provision, and it is also true that the Commission has now

conference report goes on to say that "[t]he conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees."[21] The Arbitrary Interpretation would be incompatible with, indeed directly contrary to, this stated intention of the conferees, because the Arbitrary Interpretation suggests that, in any case where a franchising authority is charging the full authorized fee for cable service, telecommunications services (and other non-cable services) would not be subject to any fee. The Rational Interpretation, on the other hand, is entirely compatible with this conference report language because it would take telecommunications service revenue out of the 622(b) cap entirely, and make it subject only to Section 253, to which the conference committee is here referring. The explanation in the conference committee report conforms exactly to the Rational Interpretation, above.[22]

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decided not to classify cable modem service as a "telecommunications service" as that term is defined in the Communications Act. But the final clause of this sentence in the conference report restates in other words what it means by "telecommunications services." The report makes clear that in this context that it is using "telecommunications services" to mean any non-cable service. That is to say, the conference committee makes clear that any revenue that is not a cable service revenue is not subject to the provision, in other words, the cap.

[21] Joint Explanatory Statement of the Committee of the Conference, in House Conference Report No. 104-58, at p. 180, reprinted at 1996 U.S.C.C.A.N. at 193.

[22] It is conceivable that someone might object that the use of the term "provision" in the conference committee report refers not to the cap provision, subsection (b), but somehow refers back to subsection (a) which says that a cable operator may be required to pay a franchise fee. Under this reading, the committee report would supposedly be endorsing the Arbitrary Interpretation above. But in fact such a reading of the committee report could only be sustained if Congress had added the "to provide cable services" concept in 622(a) rather than 622(b). If the conference committee's reference to "provision" meant 622(a), then presumably even a franchise charging a 3% fee on cable service revenue would be preempted from collecting a fee on information service revenue, and there is no possible reading of the amended subsection (b) that reaches that result. Consequently, the conference committee report's reference to the "provision" from which non-cable services are exempt must be referring to the cap created by Section 622(b).

Nor is it necessary to rely solely on legislative history to conclude that the Rational Interpretation is the only appropriate understanding of Section 622(b). It is also the only reading that makes coherent policy sense. The Commission has made it clear that one of its primary policy goals is to achieve a platform-neutral regulatory treatment of broadband Internet access service. The Rational Interpretation is consistent with that goal because it subjects cable modem service to the same state and local franchise requirements as are applicable to other broadband Internet access providers using public rights-of-way. If state and local law require payment of franchise rental reflecting revenue from broadband services, cable companies would be required to pay franchise rental reflecting revenue from broadband services. Alternatively, where state and local law prohibit franchise rental reflecting revenue from broadband service, cable companies would not be required to pay franchise rental reflecting revenue from broadband service.

The Arbitrary Interpretation, by contrast, would grant cable companies a special exemption from rental on broadband revenue not available to others with facilities in public rights-of-way. Because Title VI, including Section 622(b), is only available to cable companies, the exemption from franchise rental that would result from applying the Arbitrary Interpretation would only be available to cable companies. The Arbitrary Interpretation would give cable companies an exemption from franchise rental with respect to their broadband revenue merely because they are cable companies subject to Title VI.

To achieve its goal of platform-neutrality, the Commission should and must find that the Rational Interpretation, the only interpretation supported by legislative history, is also the only appropriate one. It is the only interpretation that applies federal law in a platform-neutral manner, allowing state and local law on franchise rental to apply both to cable companies and other companies alike.

The City notes, in this connection, that it is not clear from the language of the NPRM which interpretation of 626(b) the Commission proposed to adopt. After quoting the provision, the NPRM states in Paragraph 105: "Given that we have found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined." This statement is as much subject to the same two mutually exclusive interpretations as the statutory clause itself. In response to the Commission's solicitation of comment on this issue[23], the City urges the Commission to clarify that this sentence reflects the Rational Interpretation, for all of the reasons described above.[24]

[23] See the penultimate sentence of Paragraph 105 of the NPRM: "We seek comment on this issue." This invitation appears to apply to the franchise rental issue generally, and not merely to the tentative conclusion in the immediately preceding sentence. Presumably if the Commission had sought comment only with respect to the tentative conclusion, and not to the issue generally, it would have said so.

[24] Even common sense would seem to compel adoption of the Rational Interpretation. The 5% revenue cap in Section 622(b) is reflects the notion that the rental value of facilities can be fairly calculated using the revenues generated by the facilities – a concept often used in business leases for property leased to provide retail goods and services (of which cable and cable modem services are examples). In this context, to arbitrarily apply the revenue percentage to one stream of revenue generated by the relevant facilities and not the other is to arbitrarily under-reflect the rental value of the facilities.

The City notes, in addition, that it would be particularly inappropriate, and perhaps illegal, to apply the Arbitrary Interpretation to *existing* franchises agreements, particularly those that specifically contemplate that cable modem service revenue will be subject to franchise rental (for example by agreeing that cable modem services will be treated as cable services for purposes of the particular franchise agreement). Under Section 626 of the Communications Act, a franchising authority's determination of whether a franchise renewal proposal is sufficient to justify renewal depends, among other things, on a determination of whether a proposal meets the future cable-related community needs and interests, *taking into account the cost of meeting such needs and interests*.

Existing franchise agreements that resulted from the federal renewal process, especially those (such as the City's) that provide that cable modem service will be treated as cable service (including for purposes of calculating franchise rent), were adopted by parties mutually contemplating that among the cable company's costs would be franchise rental on cable modem revenue. Had that particular cost not been contemplated, than it presumably would have been appropriate for the franchising authority to consider whether there were other types of community needs and interests (that were not served because of cost issues) that could be served given the company's revised cost structure. Thus, for example, the City anticipates that it will receive more than $2.5 million in rental, from its existing Time Warner Cable franchises, next year (and more in future years) specifically attributable to cable modem service revenue. If Time Warner Cable is not going to incur that cost, because the Commission mistakenly and inappropriately preempts the City from collecting such amount, then under Section 626 the City's

evaluation of the amounts Time Warner has available to serve community needs and interests, for example capital costs of public, educational and governmental access, is properly subject to increase by $2.5 million next year (and more in future years).

The most straightforward and least confusing way for the Commission to handle this particular problem (short of adopting the Rational Interpretation and avoiding the problem in the first place, which is what the Commission should be doing in any event) would be to grandfather existing franchise agreement treatment of rental on cable modem revenue. Otherwise, the Commission would, to be consistent with Section 626, have to find that all existing franchises are reopened, or perhaps authorize franchising authorities to impose additional community needs and interests requirements to take into account the new, reduced costs calculation. Failure to take at least one of these steps would mean the Commission is seriously in danger of illegally impairing an existing contract to the detriment of local communities, of creating a direct contradiction with the renewal provisions of Section 626, and invalidating existing franchise agreements as having been based on a mutual mistake in the determination of critical business terms.

Paragraph 105 of the NPRM also includes the tentative conclusion "that Title VI does not provide an independent basis of authority for assessing franchise fees on cable modem service."[25] The City believes that this tentative conclusion may be correct so far as it goes (assuming that the Commission's categorization of cable modem service as an information service is lawful), but it is fundamentally beside the point in jurisdictions

[25] *Internet Over Cable Facilities NPRM,* ¶ 105

such as New York City, where the authority to require franchise rental arises out of state and local law, and does not require an independent basis of authority from Title VI.[26] This issue may be relevant for a jurisdiction that has no basis, other than federal law, for the authority to charge franchise rental. However, as that is not the case for the City, there is no great need for us to comment here in detail on this particular tentative conclusion. We would merely ask that the Commission clarify that this conclusion is intended only to have the specific effect of foreclosing a grant of federal authority where no state or local authority exists, and is not intended to interfere with local authority. As discussed elsewhere in these comments, such interference would be beyond the scope of the Commission's authority.

## II. THE COMMISSION DOES NOT HAVE THE LEGAL AUTHORITY TO ADOPT A PROHIBITION AGAINST LOCAL FRANCHISING OF CABLE MODEM SERVICES.

No statutory basis exists for concluding that Congress has preempted, or authorized the Commission to preempt, local government authority to franchise the use of public rights-of-way to provide information services. The NPRM notes three possible routes, in two

[26] The City's current franchising framework accommodates treating cable modem service as an information service. Under the framework, distinct franchises are issued to operators of cable television, public pay telephones, local "high-capacity" (or "broadband") telecommunications services and (to the extent wireless services require access to right-of-way) wireless telecommunications. The services authorized by a high-capacity franchise reflect a "catch-all," encompassing all manner of communications services, using public rights-of-way, that do not belong in any of the other categories. Indeed, the City currently franchises digital subscriber line service in the high-capacity franchise category. Thus, to the extent the City was no longer to treat cable modem service as authorized under a cable service franchise, such service would require, and be eligible for, a broadband franchise.

categories, for potentially finding such preemption or preemption authority, but upon scrutiny such routes fail to provide a basis for such preemption or preemption authority. First, the NPRM refers to the Commission's general "authority under Title I to preempt non-Federal regulations that negate the Commission's goals."[27] This authority is, according to the NPRM, ostensibly supported by California v. FCC[28] ("California") and Computer and Communications Industry Association v. FCC[29] ("CCIA"). Second, the NPRM cites two provisions internal to Title VI, specifically sections 624(a) and 624(b) as potential bases for preemption.[30] The failure, as discussed below, of each of these routes to provide a plausible basis for preemption of local franchising authority over use of public rights-of-way for provision of information services is discussed, in turn, below. [31]

**Title I does not authorize the FCC to preempt local government authority to franchise the use of public rights-of-way to provide information services.**

[27] *Internet Over Cable Facilities NPRM,* ¶ 98.

[28] *California v. FCC*, 39 F.3d 919 (9th Cir. 1994).

[29] *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[30] *See Internet Over Cable Facilities NPRM,* ¶¶ 98 and 102.

[31] As a preliminary matter, it is also worth reflecting on Commissioner Copps admonition that the FCC's Declaratory Ruling has "forced" cable modem service into the "generally deregulated information services category, subject only to the Commission's ancillary jurisdiction of Title I." See Separate Statement of Commissioner Copps appended, *Internet Over Cable Facilities NPRM.* Having taken this first step, Commissioner Copps continues, the Commission now weighs constructing "its own regulatory framework under its ancillary jurisdiction." *Id.* This regulatory framework could, according to the NPRM, encompass the "Commission's authority under Title I to preempt non-Federal regulations that negate the Commission's goals, including regulations affecting enhanced services." *Internet Over Cable Facilities NPRM,* ¶ 98. The NPRM sets its sights, specifically, on "the important responsibility of local and State governments to manage rights of way." *Id.*, ¶ 101. At some point, the FCC must consider whether it is attempting to construct a regulatory path to its own desired outcome, which, nonetheless, travels far from Congressional direction or intent.

The California and CCIA cases, cited in the NPRM, support preemption only of certain types of state *regulation* of information services that would directly contradict considered regulatory action by the Commission. These cases have absolutely nothing to do with preemption of local right-of-way *franchising,* and, in any event, take a properly narrow view of the scope of the Commission's preemption authority. Such view cannot remotely be said to support a broad preemption of local franchising authority.

The California decision, for example, makes clear that it is following the principle that the Commission is authorized to preempt state authority only when the state regulation in question "could not feasibly coexist" with the Commission's approach.[32] The California court refers to this concept as the "impossibility" exception to the assumption of state freedom from preemption.[33] The court also recognizes that "the impossibility exception is narrow, and that the FCC has the burden of showing that the state regulation would negate valid FCC regulatory goals."[34] Such a restrictive approach to preemption could not possibly support a broad preemption of all local franchising authority over use of local rights-of-way for provision of information services.[35]

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[32] *See California v. FCC*, 39 F.3d at 931.

[33] *Id.*

[34] *Id.*

[35] It is not inconceivable that there are some particular conditions or provisions (or types of conditions or provisions) of a local franchise for information services that would so directly contradict a settled FCC approach to regulation of such services that such local conditions or provisions might be preempted under the California test cited by the in footnote 336 of the *Internet Over Cable Facilities NPRM*. For example, it might be that if the FCC were to adopt a carefully considered approach to "open" (or "forced") access with respect to cable company-provided information services, franchise requirements inconsistent with that approach could, arguably, be preempted. That, however, is not the matter immediately at issue. What the City is argues in this part of its comments is simply that the basic concept of local franchising of the use of local rights-of-way for the provision of information services is not preempted under current law, cannot be preempted by the FCC under current law, and in any event should not be preempted for good public policy reasons. The issue of preemption of particular conditions or provisions or types of conditions or provisions of local franchises is beyond the scope of this part of the City's comments.

Moreover, a broadly defined regulatory "goal" of promoting the growth of broadband cannot support a finding that the mere exercise of a local government's authority over use of its own local streets would "negate" the broad regulatory goal. Indeed, local government franchising authority has proven consistent with (and, in fact, has helped ensure) the availability of cable television service to 104 million households in the United States[36], and actual subscription to cable television service by 69 million households in the United States.[37] If broadband Internet access can achieve these levels of availability and penetration – levels that have been achieved in the cable television service context consistent with, and not through preemption of, local franchising authority – the effort to promote wide broadband use will have been a tremendous success.[38]

As discussed, Congress itself established the goal of promoting the growth of telecommunications services in the 1996 Telecommunications Act, but did not conclude that local franchising authority would negate this goal. Rather, even as it sought to promote the growth of telecommunications services, Congress specifically recognized and preserved franchising authority.[39] It is not possible to gather from that combination of Congressional actions that Congress approved, with respect to information services, that

[36] "In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming" , CS Docket No. 01-129, Eighth Annual Report, FCC 01-389 (January 14, 2002), ¶ 17.

[37] Id., ¶ 18

[38] Indeed, as discussed infra, similar success can reasonably be expected based on the trends and expert forecasts recently reported by the Commission on investment in, and deployment of, cable modem services. *See* Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable and Timely Fashion, CC Docket No. 98-146 (2002) (*Third Report*)

[39] *See* Section 253(c) of the 1996 Telecommunications Act.

the growth of such services required a preemption of local franchising authority.[40] There is, in short, no basis for the Commission now to find that Congress anticipated that promoting the growth of information services would be "negated" by the mere existence of local government authority over local rights-of-way. Furthermore, as discussed below, the years of legal conflict that would inevitably result from any attempt to override local franchising authority on this deeply questionable basis could itself damage the growth of cable company-provided Internet access service. The City urges the Commission not to pursue such a futile and self-defeating effort to preempt local government authority over local rights-of-way.[41]

[40] Indeed, if anything Congressional preservation of franchising authority over Title II "telecommunications service" in Section 253(c) suggests that Congress would certainly preserved franchising authority with respect to "information services." After all, "telecommunications services" covered by Title II have significant common carrier obligations attached to them, which provide significant public benefits and which Congress found sufficient to justify somewhat restricting -- although by no means preempting entirely-- the full scope of state and local franchising authority over "telecommunications services" (See Section 253(a) of the Communications Act). But the public obligations of Title II common carrier "telecommunications services," which provided the basis for Congress to mildly restrict local franchising authority, are precisely those public obligations that the Commission chose *not* to apply to cable modem service when it chose to treat such service not as a "telecommunications service" covered by Title II, but rather as an "information service" that is not covered by Title II (and thus not covered by Section 253(a)) That is, the Commission could have ensured that cable modem service received the protection of Section 253(a) by classifying such service as a "telecommunications service," with the associated public obligations that go along with that classification. Having failed to so classify cable modem service, it would fly directly in the face of the Congressional scheme for the Commission to try to apply even the limited circumscription in Section 253(a), which applies only to "telecommunications service," much less an even more aggressive preemption that Congress did not apply even to "telecommunications service."

[41] The City notes, in this regard, that certain language in the NPRM suggests a possible misunderstanding by the Commission of the origin and basis of local franchising authority. In Paragraph 102 of the NPRM, the Commission states "that Section 621 authorizes local franchising authorities to require cable operators to obtain a franchise." In fact, Section 621 does not "authorize" local franchise authorities to exercise franchising authority. Local governments, such as the City, have such authority under common law, state law, and or local law. Preemption of local franchising authority involves not a mere circumscription of an authority granted by Congress to local governments in Section 621, but, rather, a new and affirmative preemption of a preexisting power of state and local governments over the use of local streets -- an affirmative preemption which is only lawful under the strictest test, a test that cannot be met here to preempt local franchising of use of local streets for provision of information services. For the comprehensive judicial rejection of (1) the view apparently suggested by the Commission in NPRM Paragraph 102 that Section 621 is the origin of local franchising authority and (2) a Commission claim of

**Title VI does not, even remotely, suggest that localities may not impose an additional franchise on a cable operator that provides cable modem service.**

In addition to alluding to general principles and goals arising out of Title I, the NPRM offers two citations internal to Title VI of the Communications Act as potential justifications for entirely preempting local franchising of cable modem services. Specifically, in its reading of Section 624(a) and Section 624(b), the Commission tentatively suggests that "Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service."[42] This is patently incorrect. Each of these sections is discussed, in turn, below. As a threshold matter, however, the City observes that no preemption that arises internally from Title VI could, even if legally defensible, meet the Commission's stated goal of developing an approach to provision of broadband access to the Internet that is "consistent across multiple platforms."[43]

Any preemption that arises out of Title VI would necessarily be applicable only to platforms covered by Title VI; that is, to service offered by cable operators. Such preemption would, for example, not be applicable to digital subscriber line ("DSL") platforms that are not covered by Title VI. To the extent that under state and local law broadband providers using local rights-of-way are subject to franchise requirements, DSL providers would be unable to use any preemption by the Commission that arises out of

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preemption authority arising from that view, see City of Dallas v. FCC 165 F.3d 341 (5th Cir., 1999). See also Gregory v. Ashcroft 501 U.S. 452 (1991), cited in City of Dallas.

[42] *Internet Over Cable Facilities NPRM*, ¶ 102.

any provision of Title VI. It does not appear to the City that a basis for preemption that extends only to one platform would be consistent with the Commission's stated goal of consistency across platforms.

In any event, however, neither subsections (b) nor (a) of Section 624 provide a basis for a broad preemption of local franchising authority.

Contrary to the suggestion Paragraph 98 of the NPRM, Section 624(b) does not provide the Commission with the authority to preempt state and local franchising of information services. Paragraph 98 heavily edits the language of Section 624(b), making it appear to provide this type of sweeping preemptive power. However, the unedited language of Section 624(b) must be interpreted otherwise.[44] The plain meaning of Section 624(b), when read in its entirety, is that franchising authorities are not forbidden from imposing requirements as to facilities and equipment when listing their requirements for franchising. Authorities are, however, forbidden from imposing requirements pertaining to *programming*, whether the programming is on video or other information services.

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[43] *Id.*, ¶ 6.

[44] *§ 624(b): In the case of any franchise granted after the effective date of this title, the franchising authority, to the extent related to the establishment or operation of a cable system—*

> *(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 626), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h), establish requirements for video programming or other information services; and*
>
> *(2) subject to section 625, may enforce any requirements contained within the franchise—*
>
> *(A) for facilities and equipment; and*
> *(B) for broad categories of video programming or other services*

Indeed, according to legislative history, Sections 624(a) and (b) were intended by Congress "to provide procedures for and impose limitations on a franchising authority regarding the establishment of *requirements* related to services, facility, and equipment provided by a cable operator."[45] Congress did not intend to curtail establishment of franchises, but, rather, intended to curtail requirements related to cable services once the franchise was established. The language in Sections 624(a) and (b) was not substantively changed by the Telecommunications Act of 1996. Congress originally wrote the language in Section 624(b)(1) in advance of the "Internet era," at a time when restrictions on programming choices were salient issues. In 1996, Congress chose not to substantively alter the language, indicating that it wanted the language to continue to deal with limiting franchisors' control of content, rather than any supposed limit on franchising authority.

In fact, Section 624(b) actually protects municipalities and local franchising authorities. Specifically, Section 624(b)(2) provides that a franchising authority "may enforce any requirements contained within the franchise (A) for facilities and equipment; and (B) for broad categories of video programming or other services."[46]

Section 624(b)(1) refers to requests for proposals to franchise only. Section 624(b)(2) states that the franchising authority may any enforce *any* requirements contained in the franchise once it is granted. Thus, far from giving the Commission preemptive authority over franchising authorities, Section 624(b) encourages State and local franchising

[45] H.R. Rep. No. 98-934, (emphasis added).

authorities as evidenced by both the plain language of the statute and by legislative intent.[47]

Paragraph 102 of the NPRM quotes Section 624(a) of the Communications Act (that "[a]ny franchising authority may not regulate the services, facilities and equipment provided by a cable operator except to the extent consistent with this title"), and goes on to state, "[b]ased on the foregoing, we tentatively conclude that Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service." If, by this tentative conclusion, the Commission means that, even where state or local law provides a basis for local franchising of cable modem service, franchising authorities are would be preempted from requiring a franchise, such a conclusion cannot arise from the language of Section 624(a) because each of the following is true (and any one would suffice):

- Section 624(a) says "may not regulate," i.e., it does not say "may not franchise."

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[46] Section 624(b)(2) of the Cable Act, 47 U.S.C. § 544(b)(2).

[47] It would be deeply inconsistent for the Commission to find that when Section 624 (b) uses "information services" the provision is referring to or including cable modem service generally (as opposed to particular content services such as, for example, Yahoo or E-bay), because such a finding would be precisely the opposite of the assumption the Commission itself uses in its ruling that cable modem service is not a "cable service." See Paragraph 66 of the Declaratory Ruling, in which the Commission dismissed as irrelevant specific legislative history of the 1996 Telecommunications Act stating that Congress intended in that Act to expand the definition of "cable service" to include "information service." In the face of that usage of "information services" in the legislative history, the Commission concluded in its Declaratory Ruling that Congress was not referring to cable modem service or, as the Commission put it in Paragraph 66 "stand-alone 'information services' as defined in the 1996 Act or 'enhanced services as that term has traditionally been defined." The City submits that if the Commission interprets the phrase "information services" as it appears in Section 624(b)(1) to mean or include cable modem service, then the Commission will seriously undermine its own argument that Congress did not mean cable modem service when it expanded the definition of "cable service" to "reflect the evolution of cable to include… information services."

- There is nothing inherent in a state or local law based franchise requirement for cable modem service that would be "inconsistent" with Title VI.

- If Section 624(a) had been intended to limit state and local authority to franchise the use of facilities in public rights-of-way for services other than "cable service," then it appears there would have been no reason for Congress to adopt separate provisions (see Section 621(b)(3)(A)(i) and (b)(3)(B)) specifically stating that a Title VI franchise is not required for a cable operator to provide a "telecommunications service," and prohibiting franchising authorities from imposing Title VI-based requirements on cable operator-provided "telecommunications service." It would not be rational to conclude that Congress adopted Section 621(b)(3)(A)(i) and (b)(3)(B) when an existing provision already had the desired effect (or, actually, even more than the desired effect, if the Commission is really viewing 624 as a basis for preemption of franchising generally because the Section 621 provisions are by their terms limited to circumscribing Title VI franchising and requirements only, not state and local law based franchising and requirements).

- In any event, it is not clear that, at least with respect to its cable modem services, or even generally with respect to all its redesigned facilities, a company providing cable modem services is still a "cable operator" as that term is used in Section 624(a).

In conclusion, preemption of local franchising authority would involve a new, and affirmative, preemption of a preexisting power of state and local governments over the use of local streets. Such affirmative preemption is lawful only under the strictest test. That test does not come close to being met here to preempt local franchising of use of local streets for provision of information services.

**There should be no doubt that local government franchise fees were not intended to be prohibited, or limited, by the Internet Tax Freedom Act.**

While the NPRM references the 1998 Internet Tax Freedom Act in at least two instances[48], it is unclear whether the Commission intends to suggest that the ITFA somehow supports a finding that local franchise fees on information services should be prohibited, or otherwise limited. In fact, the ITFA is drafted unambiguously to avoid imposing any limitation on local franchise fees. The main effective provision of the ITFA, section 1101(a), states that "[n]o State or political subdivision thereof shall impose . . . any taxes" on Internet access.[49] However, section 1104(8) unambiguously excludes franchise fees from the term "taxes."[50] If there was any remaining doubt (although there should be none) that the ITFA did not intend to limit local franchise fees, section 1104(8)(B) makes the matter utterly clear. That section provides that the term "taxes," as

[48] The last sentence of Paragraph 105 of the NPRM "notes" the language and intent of the ITFA, and Footnote 350 of the NPRM specifically refers to the ITFA. (The ITFA is also discussed in Paragraph 69 of the NPRM, with respect to determining the proper regulatory classification for cable modem service.)

[49] Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Title XI, Section 1101(a).

[50] *Id.*, Section 1104(8).

set forth in the ITA, "does not include any franchise fee or similar fee imposed pursuant to section 622 or 653 of the Communications Act of 1934 . . . or any other fee related to obligations of telecommunications carriers under the Communications Act of 1934."[51]

Obviously, the Congress that adopted the ITFA contemplated that cable modem services would, if subjected to local franchise fees, be charged pursuant to Title VI (subject to the limits of Section 622 or 653) and/or Title II (subject to the limits of Section 253), and intended to protect such fees from the ITFA moratorium. It is true that the Commission has now done what the Congress that adopted the ITFA never intended, that is, construe cable modem service as neither a Title VI nor a Title II service. But that step hardly changes the fact that the Congress of the ITFA clearly and unambiguously intended that franchise fees with respect to Internet access provided by cable companies would not be subject to the ITFA moratorium – there is no other conceivable understanding of the exclusion of franchise fees covered by Section 622 from the definition of "taxes" in the ITFA.

## III. IT WOULD BE BAD POLICY FOR THE COMMISSION TO ATTEMPT TO ADOPT A PROHIBITION AGAINST LOCAL FRANCHISING OF CABLE MODEM SERVICES.

[51] *Id.*, Section 1104(8)(B). As the Commission itself notes, Section 1104(8)(A)(i) of the ITFA excludes from the term "tax" any "fee imposed for a specific privilege, service or benefit conferred." *Internet Over Cable Facilities NPRM*, ¶ 105. That phrase precisely describes the characteristics of a franchise fee, which is a rental imposed for the specific benefit of gaining the privilege to use the public rights-of-way to install and maintain the facilities that provide the service. (See infra for discussion of the false notion that provision of cable modem services requires no impingement on rights-of-way.)

**An attempt by the Commission to prohibit local franchising of cable modem service will trigger years of litigation and create uncertainty that could slow the rollout of this popular service.**

Years of litigation would inevitably result from any attempt by the Commission to remove local franchising authority over cable modem service based on the theories suggested in the NPRM.[52] Such legal conflict would shroud broadband service itself in extended uncertainty, running counter to the very goal expressed by the Commission in Paragraph 97 of the NPRM "to remove regulatory uncertainty that may discourage investment and innovation in broadband services and facilities."[53] This course of events could actually slow the impressive growth in deployment of cable-company provided Internet service.

Ultimately, there is no evidence to suggest that local franchises currently inhibit the Commission's ability to achieve its national broadband policy goals to "promote the deployment of advanced telecommunications capability to all Americans in a reasonably timely manner."[54] On the contrary, the Commission's February 2002 Report on the

[52] The most likely outcome of such litigation would be a decision similar to City of Dallas, 165 F.3d 341, resulting in virtually unfettered franchising authority for local governments. In City of Dallas, the Fifth Circuit Court of Appeals rejected, in no uncertain terms, the Commission's attempt to read preemptive intent into a provision of the 1996 Telecommunications Act governing the franchise obligations of open video system providers. See 47 U.S.C. §573(c)(1)(C). Indeed, the argument in favor of Congressional preemptive intent in the Dallas case was much stronger than it is here, and the Fifth Circuit still rejected it as insufficient.

[53] *Internet Over Cable Facilities NPRM*, ¶ 97.

[54] *Id.*

deployment of advanced telecommunications capability[55], found "significant" recent investment in cable infrastructure[56], and similarly impressive increases in the availability of, and subscriptions, to cable modem service.[57] Specifically, the Report found that $15.5 billion had been invested by the cable industry in 2000[58], representing a 45.9 percent increase over the $10 billion invested in 1999.[59] This level of investment was expected to remain relatively constant in 2001,[60] despite the dramatic slowdown in the economy and stock market.[61]

The Report found that "increased availability of cable modem service" has resulted from this investment.[62] Cable modem service was expected to be available to 77.5 million homes in 2001[63], as compared to 58.8 million homes in 2000[64], and 35.5 million homes in 1999.[65] Most impressively, according to the Report, "[o]ne analyst predicts that by 2003 *investment spending is expected to result in the upgrade of substantially all of the*

[55] Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable and Timely Fashion, CC Docket No. 98-146, Report (2002) (*Third Report*).

[56] *Id.*, ¶ 65.

[57] *Id.*, ¶ 66.

[58] This represents "construction of new plants, upgrades, rebuilds, new equipment, and maintenance of new and existing equipment." *Id.*, ¶ 65.

[59] *Id.*

[60] "Analysts expect that operators will have spent an estimated $14.7 billion in 2001. *Id. citing* Paul Kagan Assocs., Inc., *Estimated Capital Flows in Cable TV*, The Broadband Cable Financial Databook 2001, Jul. 2001, at 138.

[61] See *Third Report* at ¶ 89.

[62] *Id.* at ¶ 65.

[63] *Id. citing Morgan Stanley – Broadband Part Duex* at 46.

[64] *Id.*

[65] *Id*.

*U.S. cable infrastructure (more than 99.9 million homes) to enable delivery of new bandwidth-intensive services*."[66]

**Inasmuch as deploying cable modem service imposes additional burdens on public-rights-of way, prohibiting franchises on such service would force taxpayers to subsidize private cable operators.**

Arguably, in order to provide cable modem service, cable operators impinge on public rights-of-way in at least three significant ways that would, otherwise, not be necessary. First, a cable operator generally must alter its current "tree and branch" system architecture[67] to a hybrid fiber coaxial cable ("HFC") system in a "hub and spoke" architecture.[68] The hubs are also referred to as "nodes," and the spokes are fiber optic cables that connect nodes directly to the cable system's headend. Such a requirement

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[66] *Id.* citing Richard Bilotti, Benjamin Swinburne, and Megan Lynch, *Broadband Cable Television, The Past is Prologue to the Future…*, Morgan Stanley Equity Research, Oct. 4, 2001, at 33.. (emphasis added) According to the Report, subscribership to cable modem service is also increasing. At the end of 2000 there were approximately 3.9 million cable subscribers. By year-end 2001, an industry analyst estimates that cable modem subscriptions will almost double, to 7.5 million subscribers. In addition, that same analyst expects that over the next five years, cable modem subscriptions will continue to increase dramatically, reaching an average estimate of 28-30 million by 2006 and forecast penetration rates for cable modems to increase to 40 percent by 2006. *Id.* (citations omitted) See also Robert Sachs, President and CEO, National Cable & Telecommunications Association, Remarks to Cable Telecommunications Public Affairs Association Forum (March 12, 2002): "In the six years since the passage of the '96 Telecommunications Act, *the cable industry alone has invested more than $55 billion to upgrade nearly a million miles of plant with fiber optics*. That's enough fiber optic cable to circle the globe 50 times! This massive broadband infrastructure investment, which translates into about $1,000 per subscriber in upgraded cable systems, is nearly 80% complete. . . . More than 70 million households in urban, suburban, and rural America now have access to cable-delivered high-speed Internet services. And 7.2 million of these homes have already subscribed. Since less than 60% of US households own personal computers cable modem penetration among residential PC owners stands at 17% across the industry. Where cable modem service has been available in a market for several years, penetration is even higher. In fact, *Broadband Internet growth has outpaced successful consumer services such as color TV's, cell phones, CD's and VCR's*." (emphasis added)

[67] *See Internet Over Cable Facilities NPRM*, ¶12.

[68] *See Id*., ¶ 12 concerning "ring" or "star-type" infrastructure designs.

would not be necessary if providing television signals was the only purpose of a system. Nodes are designed to provide only approximately 500 or fewer homes with cable modem service. The relatively small number of homes served is required to make available increased "downstream" signal transport capacity in order to have fully functioning high-speed cable modem service. Due to the shared capacity nature of a cable modem system, if a cable operator is able to attract a large number of subscribers to its cable modem service, each customer diminishes the amount of bandwidth available to other customers in a given node. This causes speeds to drop to below broadband levels. Consequently, cable operators will often (as is reputedly the case in the City) lay additional fibers in the public rights-of-way. The fibers are not needed for cable television service, but rather are necessary to "split down," or subdivide, the node into smaller household groupings so that the level of service can be regained.

Second, the redesign of the cable system requires installation of increased numbers, and new types, of electronics in the public rights-of-way. In the City, for example, the conversion of the existing cable systems to HFC systems will require the installation in the PROW of thousands of large cable pedestal boxes. (Indeed, more than 425 pedestal boxes have already been installed in the City.) Such pedestal boxes may contain, depending upon several factors, amplifiers for the fiber optic cables, complete fiber nodes, back-up batteries to power the entire node, and assorted other electronics to ensure the functioning of the cable modem services. Although some of the pedestal boxes may be required for the transition to digital television service, particularly where they contain

the fiber nodes, some number exists primarily to provide cable modem services.[69] The pedestal boxes, which require a fairly significant amount space and are not particularly attractive to begin with, are frequently vandalized by graffiti.[70] This, in turn, creates an additional oversight burden.

Third, the eventual provision of new types of services via the cable modem, such as Internet telephony or hybrid Internet protocol/circuit-switched telephony, require that the new HFC systems be powered at the coaxial spokes and equipped with backup batteries. Otherwise, a power failure would disrupt telephone service to end-users, and such offerings could not be proposed as "lifeline," or local exchange company services. In order to power systems providing this service, cable operators may require generator systems in the PROW for, presumptively, each node.

In this discussion of additional burdens on public rights-of-way, it is important to bear in mind that the essential characteristic of a franchise "fee" is that of a rental payment imposed for the privilege of using the right-of-way to install and maintain facilities that provide a particular communications service. The franchise rental compensates the public, through state and local government, for the use and occupancy of public property. Rights-of-way are, after all, property contributed by citizens, or acquired by

[69] The question of what percentage of new electronics in the PROW is dedicated solely to cable modem service is a question that cannot be quantified by municipalities without the disclosure of the relevant records by cable companies to local franchising authorities.

[70] *See* "Attachment A: Pedestal Box With Graffiti"

governments, and the permanent occupancy of such property for profit-making purposes must properly be associated with compensation to to citizens and their government.[71]

If cable operators are to be relieved of their rental payment obligation with respect to cable modem service, taxpayers will in effect be subsidizing the provision of a service by private companies who will be divested of the obligation to pay for the value of the real estate associate with the provision of the service. In the competitive, "information services" environment, subsidizing competing providers does not advance the common good. Rather, local governments bear a responsibility to their citizens to manage rights-of-way such that citizens are not required to contribute a subsidy every time providers deem it to be in their business interest to install new facilities on public property.[72]

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[71] *See* Nicolas Miller, Telecommunications Planning and Municipalities, Strategic Resources Institute Workshop on Telecommunications Planning for Municipalities, Sec. 4, at 2-3 (1999):

> Local public streets and rights-of-way are property that a local government holds on behalf of the public and that is paid for by the taxpayers. All private businesses that place wires, conduits or pipes over, on or under this public property are therefore tenants of the public. And like any property owner, the public – through its local government – is entitled to compensation from those who use its property for profit and to manage the use of that property to make sure it is used efficiently and safely.

[72] An objection to this argument may be raised that because the additional provision of cable modem service through facilities that already offer cable television service does not, ostensibly, impose additional burdens on the streets, the absence of franchise obligations for such additional service does not involve a public subsidy of the additional service. But this objection would be (1) based on a factual error (as the preceding discussion makes clear, and as the Commission itself acknowledges, systems offering cable modem service are physically different than those offering only cable television service), (2) logically incoherent (because it is impossible to determine logically which service is the one that should be associated with the use of the streets and thus is subject to franchising and which one merely tags along -- both services "use" the streets), (3) platform non-neutral (because it would benefit broadband service that is provided by cable providers but not broadband service provided by others), and (4) inconsistent with the notion memorialized in Section 622 that franchise rental is to be revenue-based (if the value of the use of the rights-of-way is to be derived by a revenue calculation, as contemplated – indeed, effectively mandated – by Section 622, then carving out a set of revenues generated from the facilities as not to be included in the revenue base is, *ipso facto,* a decision to deny the landlord/franchisor a portion of the value).

**The scope of facilities added or redesigned for cable modem service raises substantial definitional issues.**

To the extent the facilities of a cable modem service provider are not a "cable system" a variety of potential effects result. One example would be that franchises of such facilities would not be "franchises" under Title VI and would, for one, not be subject to the renewal standards and provisions of Section 626. It may be that the Commission would view this result as inconsistent with its goal of promoting certainty and regularity in the provision of cable modem service. However, to some extent, the Commission took the risk of such a result when it decided not to apply to cable modem service the relatively well-understood category of "cable service," as carefully described in Title VI of the Communications Act, and instead applied the far less settled category of "information service."

In this context, the City notes that the definition of a "cable system" in Title VI reads, in part, "the term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service."[73] Based on the preceding analysis of the nature of the facilities required to provide cable modem service (and the Commission's own analysis beginning in Paragraph 12 of the Declaratory Ruling), it appears that, with the determination that cable modem service is not a "cable service," either all or part of the facilities used to provide cable modem service do not constitute a "cable system."

[73] *See* Communications Act. § 602(7), 47 U.S.C. § 522 (1996).

If a facility is designed to provide information service, but incidentally provides, contributes to the provision of, or is associated in some way with the provision of cable service, then it does not appear that such a facility would constitute a "cable system, ecause it would not be "designed to provide a cable service." The City acknowledges that Title VI contemplates that there may be circumstances in which a facility is "designed to provide cable service" and incidentally provides other types of services (such as telecommunications services), but remains a cable system because such facility fundamentally remains one "designed to provide cable service."

However, the type of wholesale redesign described both in these comments and in the Declaratory Ruling appear to constitute a significant reordering of the intent and priorities of the design of the facilities involved, such that what exists in many or most franchise areas where cable modem service is being provided is now in part or in whole something other than a facility "designed to provide cable service," that is, something other than a "cable system." This result would, on the same logic that has been discussed elsewhere in these comments, be platform-neutral: that is, it would take a facility designed to provide information services out of the cable-service oriented Title VI and place it under a regulatory standard applied to information service providers generally.

Forunately, as described in further detail in the conclusion to these comments, the fact that the Commission has not included cable modem service in the category of "cable service" for federal law purposes, does not prohibit franchising authorities and cable

companies from agreeing (or enforcing existing agreements), as between themselves, that an "information services" franchise take in all respects the form of what looks like a "cable service" franchise, and agree to apply all the settled rules and requirements that have applied to a cable service franchise to an information service franchise. As discussed in the conclusion and recommendations section of these comments, such an approach would permit cable modem service to continue to be offered in a way that ensures certainty and regularity in the franchising of the provision of the service, and avoid the implications of an uncertain franchising regime.[74]

**The Declaratory Ruling's information service classification should not interfere with the consumer protection role of local franchising authorities.**

The NPRM notes that "[f]ranchising authorities have expressed concern that their authority to impose consumer protection requirements pursuant to section 632 of the Communications Act would be affected if cable modem service is not classified as "cable service."[75] In the City's view, notwithstanding the Declaratory Ruling's information service classification, franchising authorities would continue to play this essential role. Specifically, to the extent that cable modem service providers are "cable operators,"

[74] The City notes that the points the City makes elsewhere in these comments (including, for example, the arguments that franchise rental is fully payable with respect to cable modem service revenue, and that franchising authorities continue to have the power, not subject to Commission preemption, to franchise use of rights-of-way to provide information services) are not dependent on this argument that facilities designed to provide information service are something other than "cable systems." These other points would apply fully even if a court were to determine that a particular facility over which information services is provided is a "cable system."

[75] *Internet Over Cable Facilities NPRM*, ¶ 108, *citing* NATOA Comments at 20-21; National League of Cities, et al. Comments at 13-14.

Section 632 expressly grants Title VI-based federal authority on franchise authorities to enact and enforce consumer service requirements. If, alternatively, cable modem service providers are not "cable operators," state and local authority to enact and enforce consumer service requirements would apply without limitation by anything in Title VI. In this context, it is worth noting that such requirements have generally fostered the rollout of relatively high-quality and ubiquitous cable modem service.

## IV. GOVERNMENTS WITH INDEPENDENT FRANCHISING AUTHORITY SHOULD BE PERMITTED TO CONTRACTUALLY TREAT CABLE MODEM SERVICE AS A CABLE SERVICE.

To avoid the many uncertainties related to information services franchises, the Commission should explicitly permit local governments and cable operators to contractually agree to treat cable modem service as a "cable service," authorized under existing or future cable service franchises. This option would give cable operators who seek to offer cable modem service the clear authority to do so under the long-established, and relatively well-understood cable service franchising structure in the Cable Act.

Such an approach would not be inconsistent with the Declaratory Ruling. That is, for the Commission's purposes, cable modem service could still be considered an "information service."[76] The approach would simply allow such service to be franchised, where

[76] It is also noted that such an approach would have no effect on what is apparently the FCC's concern that "open access," or similar common carrier obligations, should not be imposed on cable modem services.

mutually agreeable to the franchising authority and cable operator, using the same format, terms and, perhaps, franchise contract as used for cable service. In sum, the City simply asks is that it be able to continue to help achieve for cable modem service what has already been achieved for tradition cable television: Ubiquitous, fair and nondiscriminatory availability of reliable cable modem service and a fair rental for the use of our streets for the purpose. Moreover, while not entirely eliminating the legal disputes arising out of the Declaratory Ruling, the City believes that this approach would at least moderate them.[77]

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The City has never argued that such obligations should be imposed on cable modem services and does not here ask the FCC to do so.

[77] In Paragraphs 106-107 of the NPRM, the Commission discusses and seeks comments on issues relating to franchise rentals collected prior to the issuance of the Declaratory Ruling. In light of the arguments in these comments that franchise rentals were, are and continue to be due and payable with respect to information services, a discussion of whether refunds are due with respect to past rental payments is irrelevant, as is a discussion as to whether the Commission has the authority to decide a refund question. The City does note however, that some language in Paragraphs 106-107 might be misconstrued to suggest that the Commission is granting some credibility to the notion expressed by some cable operators that cable operators may be exposed to "refund liability for franchise fees previously paid to localities collected from subscribers based on cable modem service revenues." Such a claim of refund liability is entirely without basis, and the Commission should make clear that by quoting the notion as expressed by certain cable operators it is not suggesting that such a claim has any basis. Even assuming that a particular payment of franchise rental by a cable company to a franchising authority was unauthorized by federal law, there is no basis to concluded that such payment results in any financial damages to any subscriber. Franchise "fees" payable by the cable company, that is, franchise rentals, are a cost for the cable company of doing business, no different in nature from the cost of renting office space, buying and installing equipment, purchasing programming, and paying salaries and labor costs. Cable companies are not required to "pass through" franchise compensation to subscribers any more than cable companies are required to pass through any of these other costs. In addition, subscriber rates for cable modem service have to date never been regulated -- that is, the rate to be charged subscribers for such service has always been entirely within the business discretion of the service provider, independent of the rise or fall of any particular specific cost element. There is, in short, no legal reason why, if a cable company stops paying a franchise rent, the rate to a subscriber must go down. As the subscriber would be entitled to no reduction in its subscription rate if a franchise rent payment is not made, the subscriber is not damaged by any payment by a cable company of a franchise rent. There is, in short, no merit to claims by subscribers against cable companies in these circumstances, and the Commission should make it clear that nothing in the NPRM should be construed to suggest that such claims have any merit.

## CONCLUSION

These comments have made clear that by classifying cable modem service as an "information service" (and not as a "cable service" or a "telecommunications service"), the Commission has set for itself what appears to be the difficult task of preserving a level of predictability and certainty in the provision of cable modem service. Existing franchises do not generally authorize the use of public rights-of-way for the provision of something called "information service," and to the extent provision of cable modem service is authorized by existing cable television franchises, it is generally only on the assumption that such service will be treated as, or as if it is, a form of cable service, with all of the franchise obligations associated with cable service. To the extent such treatment is no longer applicable, the authorization itself is no longer effective. A wide variety of settled legal doctrines that have developed around Title VI franchising since 1984 may become of questionable applicability to cable modem service.

The potential result is deep uncertainty surrounding cable modem service authority and obligations. As discussed above, the Commission lacks the authority to solve this problem by commanding franchising authorities to make rights-of-way available for cable modem service and dictating the terms of such use. The City, nonetheless, believes that with just a few simple steps consistent with state and local franchising authority, the Commission can still preserve the certainty and predictability appropriate for the continued rapid growth of cable modem service (even as it is defined as an "information service"). Thus, the City urges the Commission to take the following steps, both, to

"clarify the authority of State and local governments with respect to cable modem service,"[78] and to accomplish the goals articulated in the Declaratory Ruling and NPRM.

(1) The Commission should make clear that in treating cable modem service as an information service (and, thus, removing the *federal law* prohibition under Section 612(b)(1) against providing such service without franchise authority), it does not intend to preempt state and local laws prohibiting the provision of such service without franchise authority. Any such attempt to preempt state and local franchising power by the Commission would be beyond its authority and inconsistent with its own goals of regulatory certainty and platform neutrality.

(2) To minimize the disruption and uncertainty arising from its reclassification of cable modem service as an information service, the Commission should find that existing cable franchise agreements which *contractually* treat the cable modem form of information service as a cable service for franchise purposes (including franchise compensation purposes) are not impaired by the Commission's Declaratory Ruling.[79] Specifically, such contractual agreements should remain fully effective and enforceable, and binding on both parties, for the length of their terms. This approach would eliminate, or at least minimize, much of the immediate potential disruption arising from the requirement for potential new

[78] *See Internet Over Cable Facilities NPRM*, ¶ 96

[79] Even if the Commission has found that as a matter of the applicability of federal law, cable modem service is not a "cable service," there appears to be no legal reason why that would prevent from remaining binding a contract between a franchising authority and a cable company to franchise cable modem service as if it were a cable service, with all of the obligations on each side arising from that "as if" treatment.

franchise negotiations related to information services (and the potential contract impairment or other issues related to the viability of franchise contracts negotiated under suddenly inapplicable assumptions).[80] In this connection, the City again emphasizes that these franchises have proven to be fully compatible with the extremely successful growth of cable television to a vast majority of Americans, and there is no reason to believe that they would be incompatible with similar, continued growth in cable modem service.

(3) To assure the undisrupted provision of, and continued growth in, cable modem service, the Commission should make clear that franchising authorities and cable companies may, consistent with federal law, negotiate new agreements as between themselves to treat the cable modem service as a cable service. Such an approach might be advantageous both to franchising authorities and cable companies by allowing each to follow a template that has been successful, and which provides an historically-tested balance of benefits and burdens. If either a franchising authority or a cable company chose not to pursue this approach, then state and local law would apply to the question of whether, and on what terms, a separate information services franchise requirement would be applicable.

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Surely this approach would be more efficient than reconstructing a cable modem service franchise from scratch and with no guidance from past practice about what the terms of such a franchise should include.

[80] The City notes that if existing cable service franchise requirements that contemplate the provision of cable modem service as if it was a cable service are not enforceable, then, under the proper interpretation of Section 622(b), cable providers will face substantial uncertainty as to the level of franchise rental that a franchising authority may charge. Treated by contract as if it were a cable service, cable modem service revenue is subject to a 5% cap on rental; without such contractual treatment the cap is inapplicable and franchise rental for provision of cable modem information service becomes a subject of unconstrained (except by state and local law) negotiation between franchising authorities and providers, with the attendant uncertainty arising from such matters.

(4) With respect to franchise terms, the Commission should make clear that Section 622(b) of the Communications Act does not preempt franchising authorities acting consistent with state and local law from charging and collecting franchise rental with respect to cable modem service revenue even if the franchising authority collects rental equal to 5% of gross revenues from cable service revenue. This conclusion would arise from either the fact that the facilities designed to offer cable modem information service do not constitute a "cable system," or from the proper interpretation (supported by legislative history) of Section 622(b), both of which bases are legally compelling.

(5) Finally, the Commission should, similarly, confirm that the power of franchising authorities to establish and enforce customer service requirements regarding cable modem service is unaffected by the Declaratory Ruling's classification of such service as an "information service." This conclusion arises whether the provider of cable modem service is or is not viewed, in its role as a provider of such service, as a "cable operator." If the cable modem service provider is a "cable operator," Section 632 would expressly grant Title VI-based, federal law authority on franchise authorities to establish and enforce consumer service requirements (that is, there is no limitation in Section 632 to "cable service"). If a cable service provider is not a cable operator, then state and local authority to establish and enforce customer service requirements would be applicable without limitation by anything in Title VI.

Respectfully submitted,

/s/

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Attachment A

Pedestal Box with Graffiti